



Ngothyo & 2 others v Gicheha & 2 others (Environmental and Land Originating Summons E024 of 2021) [2023] KEELC 21512 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21512 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E024 OF 2021
A KANIARU, J
NOVEMBER 7, 2023**

BETWEEN

TERESIAH MBITHE NGOTHYO 1ST PLAINTIFF

TERESIAH MBITHE NGOTHYO 2ND PLAINTIFF

TERESIAH MBITHE NGOTHYO 3RD PLAINTIFF

AND

JANE WANJIKU GICHEHA 1ST DEFENDANT

JANE WANJIKU GICHEHA 2ND DEFENDANT

JANE WANJIKU GICHEHA 3RD DEFENDANT

RULING

1. This ruling is on a Notice of Motion dated 22.07.2022 and filed on 25.07.2022. The application has been brought by the Defendant – Jane Wanjiku Gicheha (herein referred to as the Applicant) against the Plaintiff – Teresiah Mbithe Ngothyo (herein referred to as the Respondent). It is expressed to be brought under Order 51 Rule 1 of the *Civil Procedure Rules*, Section 7 of the *Limitation of Actions Act* and Section 24, 25 and 26 of the *Land Registration Act*. The application has the following prayers:
 - a. That the Originating Summons dated 17.06.2022 be struck out.
 - b. That the costs of this application be borne by the Respondent in any event.
2. It is based on the grounds inter alia; that the Applicant’s title was registered in the first instance in the year 2012 and twelve years have not lapsed to warrant the Respondent to seek a relief for adverse possession; that the Applicant’s title to the suit land parcel L.R No. Mbeere/Wachoro/1662 has not become extinguished and that the Respondent has not acquired title to the said land; that the Applicant is not holding title to the suit land in trust for the Respondent and that the claim for trust is none



- existent and untenable in law; that the Applicant is the absolute and indefeasible owner of the suit land; and that there is no evidence of fraud, misrepresentation, illegality, failure to follow due procedure or corrupt scheme that has been demonstrated by the Respondent to defeat the Applicant's title.
3. The application came with a Supporting Affidavit sworn on 22.07.2022 by the Applicant. She deposes that she is the lawfully registered owner of the suit land herein and that the Respondent has not lived notoriously and continually in the suit land with the knowledge of the Applicant for over twelve years as required by law in order to be able to maintain a claim for adverse possession. She also deposes that she filed a suit claiming for trespass in Siakago MCL & E 46 of 2021. She attached a copy of the Plaint in the suit.
 4. The motion was responded to by the Respondent via a replying affidavit sworn on 19.10.2022. She deposed that her Originating Summons discloses a reasonable cause of action against the Applicant as she has been in continuous and exclusive occupation of the suit land from 1978 to date; that her claim in trust is valid and tenable in law as a trust is recognized by law as an overriding interest over the registered owner's title; that she duly asserted her right over the suit land as the present suit and the suit by the Applicant vide Siakago MCL No. 46 of 2021 were filed on the same date; that the value of the suit land is in excess of Kenya Shillings twenty million as the suit land is approximately 10 acres, hence this court is most suited to handle the dispute; and that the Applicant's application is incompetent and frivolous as it seeks to argue the merits of the suit.
 5. It was agreed that the application be disposed of by way of written submissions. The Applicants submissions were filed on 21.12.2022 and her position was that since the Respondents case is that she acquired the suit land herein in 1978 through an allocation by the Mwea Settlement Scheme – Embu District, the said possession and acquisition was not adverse to any other person. That there was no other registered owner of the suit land as she acquired the suit land from the government. She goes on to quote the provisions of Section 7 of the *Limitation of Actions Act* which provides for actions of recovery of land to be brought before the end of 12 years from the date on which the right of action accrued. She claims that the first registration in the instant case of the suit land herein was done on 20.01.2012 therefore time started running in 2012 and not 1978 as the Respondents right of action could not accrue unless there is somebody against whom it was enforceable. She further claims that time stopped running in 2021 when the Applicant who is the current registered proprietor invaded the suit land asking the Respondent to vacate but the Respondent failed to do so necessitating thus filing of the suit in Siakago. It was her contention that the period of twelve years is statutory and one of the main elements of adverse possession and the Respondent having failed to prove the said period, then the suit is a non-starter and an abuse of the court process. It should therefore be struck out as the Originating Summons cannot be cured by an amendment. To reinforce her position, she sought to rely on the cases of Nrb Civil Appeal No. 17 of 2016 *Chevron (K) Ltd v Harrison Charo Wa Shutu* (2016) eKLR, Nrb Civil Case No. 283 of 1990 *Gabriel Mbui v Mukindia Maranya* (1993) eKLR.
 6. The Respondent on the other hand filed her submissions on 24.01.2023. She submitted that the law on striking out of pleadings is found in Order 2 rule 15 of the *Civil Procedure Rules* which provides for the grounds on which a pleading may be struck out. It was her submission that the Applicant's application is bad in law, incompetent, and frivolous as it did not specify on which of the grounds provided for in the above provisions of the law the same was brought. She submitted further that her suit discloses a reasonable cause of action hence the same ought to be sustained; that her claim was based on a trust and that the same is a valid claim in law which affects a registered owner's title by virtue of Section 28 of the *Land Registration Act*; that Section 20 of the *Limitation of Actions Act* recognizes actions in trust and therefore the Applicant's claim that a claim in trust is not tenable is misplaced.



7. She submitted further that the Applicant’s application is fatally defective as it argues the merits of the case and introduces evidence contrary to the provisions of Order 2 Rule 15 (3) of the Civil Procedure Rules which provides for inadmissibility of evidence on applications for striking out of pleadings. That the determination on whether twelve years have lapsed for the accrual of the right to adverse possession is a matter to be determined at trial upon adducing evidence. To reinforce her position, she sought to rely on the cases of D.T Dobie & Co (Kenya) Ltd v Joseph Mbaria Muchina & Anor (1980) eKLR, Kivanga Estates Ltd v National Bank of Kenya Ltd (2017) eKR Co-operative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999 and Joseph Kibaara M’Icuga v M’Chabari Kinoro (2020) eKLR.
8. I have considered the application, the responses made to it, and the rival submissions. The issue for determination is whether the Notice of Motion has merits. As the Respondent has clearly set out in her submissions, the grounds for striking out pleadings are set out in Order 2 Rule 15 of the Civil Procedure Rules which provides as follows;
- Order 2, rule 15. Striking out pleadings.
15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- (a) it discloses no reasonable cause of action or defence in law; Or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.
9. Firstly, I think it’s important to point out that the Applicant’s application at the first instance lacks proper legal anchorage as the provisions of law under which it has been brought do not provide for the orders she is seeking. Secondly, the Applicant’s main argument is that the Respondent will not be able to succeed in her case for adverse possession. In my opinion this is a fact that can only be established at the trial of the action. That is the time the evidence adduced will establish whether the Respondent can sustain her cause of action. This cannot be done at a preliminary stage of the proceedings. To do so would be dismissing the Respondent’s claim without having heard her on her case which goes against the rules of natural justice.
10. The courts have deliberated on the issue of striking out of pleadings severally and in the case of Ramji Megji Gudka Ltd –vs- Alfred Morfat Omundi Michira & 2 others [2005] eKLR as cited in the case of Gladys Jepkosgei Boss v Star Publication Limited [2021] eKLR.

The Court of Appeal held as follows:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings



was given very careful consideration by this Court in *Dt Dobie & Company (Kenya) Ltd. v Muchina* [1980] KLR 1 in which Madan J.A. at page 9 said: -

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

11. This court has carefully considered the materials presented by both parties. As I have said, analysing the suit at this stage to establish whether a claim for adverse possession can be sustained has the undesirable prospect of this court combing through evidence, something that should only be done during trial. Both parties will have an opportunity at the trial to present their cases and then the court can make a final determination based on that. It should also be appreciated that the issue of trust is raised. The case is therefore not one of adverse possession only; it is also one of trust. Trust requires evidence of proof. That is why hearing of the entire case is very necessary.
12. The upshot is that the merits of the application herein have not been demonstrated and I hereby dismiss it with costs to the respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER, 2023.

A.K. KANIARU

JUDGE

In the presence of M/s Mukami for plaintiff/respondent and in the absence of Ombachi for defendant/applicant

Court assistant: Leadys

Interpretation: English/Kiswahili

